

**BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,	)	DOCKETS TG-080913
	)	TG-080914
	)	<i>(consolidated)</i>
v.	)	
POINTS RECYCLING AND REFUSE, LLC,	)	ORDER 04
	)	
Respondent,	)	
.....	)	
WHATCOM COUNTY,	)	DOCKET TG-081089
	)	
Complainant,	)	ORDER 04
v.	)	
POINTS RECYCLING AND REFUSE, LLC,	)	
	)	
Respondent,	)	
.....	)	
RENEÉ COE, SHELLEY DAMEWOOD, and SHANNON TOMSEN,	)	DOCKET TG-082129
	)	<i>(consolidated)</i>
	)	
Complainants,	)	ORDER 02
v.	)	ORDER DENYING MOTION TO DISMISS AND DENYING CROSS MOTION
POINTS RECYCLING AND REFUSE, LLC, and WHATCOM COUNTY,	)	
	)	
Respondents.	)	
.....	)	

1 ***Synopsis.** This order denies Points Recycling and Refuse, LLC’s motion to dismiss the complaint filed by Reneé Coe, Shelley Damewood, and Shannon Tomsen, finding that Complainants have alleged facts which, if proven, would support their request for an order imposing penalties against Points or cancelling Points’ certificate G155. This order also denies Complainants’ cross motion requesting that the Commission deem Points to have admitted all of the allegations against it, finding that the Commission has already construed Points’ December 24, 2008, letter as both an answer to the Coe Complaint and a motion to dismiss.*

2 **NATURE OF PROCEEDING.** Docket TG-080913 involves a tariff filing by Points Recycling and Refuse, LLC (Points or the Company) with the Washington Utilities and Transportation Commission (Commission) to remove curbside recycling from the Company’s tariff. Docket TG-080914 involves a tariff filing by Points to add the company-specific definition of “Alternative Daily Landfill Cover” to Points’ tariff. Docket TG-081089 involves a complaint filed by Whatcom County against Points to revoke the Company’s certification as the designated hauler for Point Roberts, Washington. Docket TG-082129 also involves a complaint (Coe Complaint) against Points and Whatcom County filed by Reneé Coe, Shelley Damewood, and Shannon Tomsen (Complainants).

3 **APPEARANCES.** Dan Gibson, Whatcom County Deputy Prosecutor, Bellingham, Washington, represents Whatcom County. James Sells, Ryan Sells and Uptegraft, Inc. P.S., Silverdale, Washington, represents Points. Jonathan Thompson, Assistant Attorney General, Olympia, Washington, represents the Commission’s regulatory staff (Commission Staff or Staff).<sup>1</sup> Complainants, Point Roberts, Washington, are appearing pro se.

4 **PROCEDURAL HISTORY.** On June 27, 2008, the Commission issued Order 01 consolidating Dockets TG-080913, TG-080914, and TG-081089.

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<sup>1</sup> In formal proceedings, such as this, the Commission’s regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as other parties to the proceeding. There is an “*ex parte* wall” separating the Commissioners, the presiding Administrative Law Judge, and the Commissioners’ policy and accounting advisors from all parties, including regulatory staff. *RCW 34.05.455.*

- 5 The Commission convened a prehearing conference in Dockets TG-080913, TG-080914, and TG-081089, at Olympia, Washington on December 8, 2008, before Administrative Law Judge Marguerite E. Friedlander.
- 6 On November 26, 2008, Complainants filed the Coe Complaint, under Docket TG-082129, against Points and Whatcom County. Complainants allege that the Company has failed to comply with state and county code and has abused the public trust. Complainants request that the Commission cancel Points' operating certificate, G155, prohibit Whatcom County from enacting any law or ordinance exempting Point Roberts, Washington, from curbside recycling, and impose maximum penalties allowed under all applicable laws.
- 7 On December 12, 2008, the Commission issued Order 02 in Dockets TG-080913, TG-080914, and TG-081089, establishing a procedural schedule in those consolidated matters.
- 8 On December 22, 2008, Whatcom County filed its Answer to the Coe Complaint. On December 24, 2008, the Commission received a letter from Points requesting that the Commission dismiss the Coe Complaint in Docket TG-082129 claiming that many of the issues raised by Complainants are outside of the Commission's regulatory jurisdiction.
- 9 On December 31, 2008, the Commission issued Order 03 in Dockets TG-080913, TG-080914, and TG-081089 and Order 01 in TG-082129, consolidating the four dockets and construing Points' December 24, 2008, letter as both an answer and motion to dismiss (Motion). The order also set January 9, 2009, as the deadline for filing responses to the motion to dismiss. On January 9, 2009, Complainants and Staff filed their responses to Points' motion to dismiss.
- 10 **Points' Motion.** On December 24, 2008, Points filed a letter with the Commission stating that "[p]ortions of the relief sought by the Complainant [sic] are outside of the regulatory mandate and authority of the Commission."<sup>2</sup> The Company argues that

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<sup>2</sup>*Points' Motion*, dated December 18, 2008, at 1. While Points' letter was signed by Arthur Wilkowski, owner of Points, the Company has subsequently retained the services of James Sells,

Points is in full compliance with the Commission's rules and regulations with the exception of the curtailment of the curbside recycling program.<sup>3</sup> The curbside recycling program curtailment is being addressed in Dockets TG-080913 and TG-081089, according to Points, and Complainants have already been given an opportunity to provide the Commission and Whatcom County with comments on this matter.<sup>4</sup> Points further asserts that "Complainants' consumer rights have been protected and the [Coe] Complaint is baseless and without merit."<sup>5</sup>

- 11 **Complainants' Response.** In their response to the Points' Motion (Complainants' Response), Complainants contend that Points "does not provide any foundation or documentation to support its motion to dismiss."<sup>6</sup> Complainants first take issue with Points' allegation that Complainants have raised issues over which the Commission has no jurisdiction.<sup>7</sup> Complainants deny this statement and cite to RCW 81.77.030(4) which, Complainants argue, "requires [that] the [C]ommission supervise and regulate all [of] the matters affecting the relationship between solid waste companies and the public they serve."<sup>8</sup>
- 12 In contrast to the Company's statement that Points is in full compliance with the Commission's rules and regulations except for the curtailment of the curbside recycling program, Complainants aver that Points has a long history of repeated violations of the Commission's rules and regulations.<sup>9</sup> Complainants point to their original complaint and attached exhibits in support of this claim.<sup>10</sup>
- 13 Complainants also address Points' arguments that the Complainants have already had their opportunity to comment on the dockets, that they have expressed their opinions to Whatcom County, and that their consumer rights have been protected.

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Ryan Sells Uptegraft, Inc. P.S. On January 8, 2009, the Commission received a notice of appearance in the Coe Complaint from Mr. Sells on behalf of Points.

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

<sup>6</sup>*Complainants' Response*, at 1, ¶ 1.

<sup>7</sup>*Id.*, at 2, ¶¶ 2 and 3.

<sup>8</sup>*Id.*, at 2, ¶ 3.

<sup>9</sup>*Id.*, at 2, ¶ 4.

<sup>10</sup>*Id.*

Complainants deny these statements based on the lack of information presented by Points.<sup>11</sup> Complainants also argue that the relevance of such statements is unclear, and cite the many exhibits in the Coe Complaint as evidence that their consumer rights have not been protected.<sup>12</sup>

14 In response to the assertion that the Coe Complaint is baseless and without merit, Complainants point to the distinct lack of information supplied by Points in support of this allegation.<sup>13</sup> Complainants argue that the “dispute is based on issues of fact and must be decided by a finder of fact using pertinent laws.”<sup>14</sup>

15 **Complainants’ Cross Motion.** Complainants, in their response, also move for all of the allegations made in the Coe Complaint to be deemed admitted by Points.<sup>15</sup> According to Complainants, Points did not deny the allegations in the Complaint, and, pursuant to WAC 480-07-380(2)(c), Points should be deemed to have admitted them.<sup>16</sup>

16 **Commission Staff’s Response.** On January 9, 2009, Staff filed its response to Points’ Motion (Staff’s Response). Staff argues that the Commission does not have jurisdiction over Whatcom County to prevent it from revising its solid waste management plan to exclude curbside recycling services.<sup>17</sup> As Commission Staff indicates, the Commission is authorized to hear complaints against public service companies, but not against local governmental bodies.<sup>18</sup> Staff states that, while Whatcom County has not moved to dismiss the complaint against it, “there plainly is no basis for the Commission to grant the relief sought against [it].”<sup>19</sup> Commission Staff explain that the Commission, either on its own motion or on the motion of Whatcom County, could dismiss the Coe Complaint against Whatcom County.<sup>20</sup>

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<sup>11</sup> *Complainants’ Response*, at 2-3, ¶¶ 6-8.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*, at 3, ¶ 8.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*, at 3, ¶ 1.

<sup>16</sup> *Id.*

<sup>17</sup> *Commission Staff’s Response*, at 2, ¶ 5.

<sup>18</sup> *Id.*, at 2-3, ¶ 5.

<sup>19</sup> *Id.*, at 4, ¶ 8.

<sup>20</sup> *Id.*, at 4-5, ¶ 10.

- 17 Staff asserts that the Company has not met its burden of proof by demonstrating that Complainants have failed to state a claim.<sup>21</sup> Moreover, Staff avers that, arguably, the Commission has the authority to revoke a solid waste provider's certificate or impose penalties if the Commission finds that the provider has willfully violated any of the Commission's rules and regulations.<sup>22</sup>
- 18 **Discussion and decision.** Pursuant to WAC 480-07-380(1)(a), a party may move for dismissal of a complaint on the basis that the opposing party fails to state a claim upon which the Commission may grant relief.<sup>23</sup> The Commission will consider Point's Motion under the standard applicable to motions to dismiss filed pursuant to the superior court rules 12(b)(6) and 12(c).<sup>24</sup>
- 19 An agency examining a motion to dismiss assumes all facts in the opposing party's complaint are true and may even consider hypothetical facts supporting the opposing party's claims.<sup>25</sup> Given that, dismissals are only warranted if the agency concludes that, beyond a reasonable doubt, the complainant cannot prove "any set of facts which would justify recovery."<sup>26</sup> The courts have opined that "CR 12(b)(6) motions should be granted 'sparingly and with care.'"<sup>27</sup>
- 20 The Commission assumes that all of Complainants' assertions against Points are true when examining the motion to dismiss. While Points' takes issue with much, if not all, of the Coe Complaint, the Company offers little substantive support for its Motion.
- 21 **'Opportunity to Comment' and 'Baseless' Argument.** Points' Motion merely asserts that the Coe Complaint should be dismissed as Complainants have already had

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<sup>21</sup> *Commission Staff's Response*, at 4, ¶ 8.

<sup>22</sup> *Id.*, citing to RCW 81.77.030(6) and RCW 81.04.380.

<sup>23</sup> WAC 480-07-380(1)(a).

<sup>24</sup> *Id.*

<sup>25</sup> *Kinney v. Cook*, 159 Wash.2d 837, 842, 154 P.3d 206 (2007).

<sup>26</sup> *Id.*, (citing *Hoffer v. State*, 110 Wash.2d 415, 420, 755 P.2d 781 (1988)).

<sup>27</sup> *Hoffer*, 110 Wash.2d at 421, (citing *Orwick v. Seattle*, 103 Wash.2d 249, 254, 692 P.2d 793 (1984), quoting 27 Federal Procedure *Pleading and Motions* § 62:465(1984)).

an opportunity to comment in Docket TG-080913 and through the Consumer Affairs Process and because the Coe Complaint is baseless.

22 Neither of these contentions warrants dismissal under the stringent standard for CR 12(b)(6) motions. It is irrelevant that Complainants may have already had an opportunity to express their dissatisfaction with Points regarding the suspension of curbside recycling service. WAC 480-70-386 allows the filing of formal complaints against a solid waste collection company and does not premise that filing on whether or not Complainants have exhausted every other administrative remedy. Points' contention that the Coe Complaint is baseless, without additional argument, is insufficient to dismiss the Coe Complaint.

23 **Lack of Jurisdiction.** Points' contention that that the Coe Complaint is outside of the jurisdiction of the Commission is only partially accurate. The Commission does not have jurisdiction over Whatcom County such that it can "prohibit respondent Whatcom County from enacting any law or ordinance exempting Point Roberts, [Washington,] from curbside recycling."<sup>28</sup>

24 Complainants cite to RCW 70.95.010(6)(d) in support of their request for Commission action against Whatcom County. RCW 70.95.010(6)(d) states the legislative intent that state government ensure that local government provide adequate source reduction and separation opportunities and incentives to all. Yet, a closer examination of Title 70 of the Revised Code of Washington, *Solid Waste Management – Reduction and Recycling*, does not appear to grant the Commission the authority necessary to prohibit Whatcom County from exempting Point Roberts, Washington, from curbside recycling. Title 70 provides for the drafting of county solid waste management plans and revisions to the plans, which are to be approved by the Washington State Department of Ecology (Ecology).<sup>29</sup>

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<sup>28</sup>*Coe Complaint*, at 6, ¶ 4.2.

<sup>29</sup>It is the duty of Ecology, once it receives the revised plan, to forward a copy to the Commission. See, RCW 70.95.096 and *Guidelines for the Development of Local Solid Waste Management Plans and Plan Revisions*, Washington State Department of Ecology, Solid Waste & Financial Assistance Program, Publication No. 99-502 (December 1999). RCW 70.95.110 states that a county's solid waste management plan shall be reviewed and revised periodically by counties as may be required by Ecology. Each revised solid waste management plan shall be submitted to

- 25 Complainants have not cited to any provision within Title 70 that would bestow on the Commission the power to prohibit Whatcom County from exercising its authority to exempt Point Roberts, Washington, from the curbside recycling program. In any event, Points does not have standing to request that the Commission dismiss the Coe Complaint as it relates to Whatcom County alone, and Whatcom County has not requested that the Commission dismiss the Coe Complaint filed against it.<sup>30</sup>
- 26 The Company is incorrect when it states that the Commission does not have jurisdiction over the issues raised by Complainants against Points. Pursuant to RCW 81.77.030(5), the Commission shall supervise and regulate every solid waste collection company in this state by requiring compliance with local solid waste management plans and related implementation ordinances. Complainants have alleged that, *inter alia*, Points has: 1) discontinued curbside recycling service in direct violation of the Whatcom County Solid Waste Management Plan mandate and related county ordinances,<sup>31</sup> and 2) refused to pay its regulatory fees and penalty fees when due.<sup>32</sup> The Commission does have the authority to require compliance with the Whatcom County Solid Waste Management Plan.<sup>33</sup> The Commission also has the authority to compel payment of regulatory fees and penalties.<sup>34</sup> Assuming, as the Commission must, that Complainants' allegations are true, the Commission does have the authority to impose penalties and cancel Points' certificate. Thus, Points' Motion should be denied.
- 27 **Cross Motion.** Complainants maintain that Points did not deny the allegations in their Complaint and that the allegations should be deemed admitted. The Commission has already addressed this issue in Order 03/01, stating that:

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Ecology for review and approval. A revision, according to Ecology, "entails redefining the vision for local solid waste management ... and updates each component of the plan, as necessary, to make it current." *See*, Guidelines, at 35. An example of a situation requiring a revision could include "a major shift in the level of service in a program that is not specified in the plan, which might include the addition or subtraction of curbside collections." *Id.*

<sup>30</sup>Although the Commission would entertain such a motion if the County submitted it.

<sup>31</sup>*Coe Complaint*, at 3, ¶ 3.1.

<sup>32</sup>*Id.*, at 4, ¶ 3.7.

<sup>33</sup>RCW 81.77.030(5).

<sup>34</sup>RCW 81.77.080 and .090.



[p]ursuant to WAC 480-07-395(4), the Commission shall liberally construe pleadings and motions in order to promote justice among the parties. The Commission has construed [Points'] Letter as both an answer to the Coe Complaint and a motion to dismiss under WAC 480-07-380(1)(a).<sup>35</sup>

28 Points' December 24, 2008, letter provided a denial of sorts of the allegations in the Coe Complaint by stating that it was baseless and without merit. As Points did answer the Coe Complaint, Complainants' Cross Motion should be denied.

### **ORDER**

#### **THE COMMISSION ORDERS:**

- 29 (1) Points Recycling and Refuse, LLC's motion to dismiss the complaint filed by Reneé Coe, Shelley Damewood, and Shannon Tomsen in Docket TG-082129 is denied.
- 30 (2) The cross motion filed by Reneé Coe, Shelley Damewood, and Shannon Tomsen requesting that Points Recycling and Refuse, LLC. be deemed to have admitted all of the allegations in the complaint is denied.

Dated at Olympia, Washington, and effective January 13, 2009.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARGUERITE E. FRIEDLANDER  
Administrative Law Judge

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<sup>35</sup>*Coe, et. al., v. Points, et. al.*, Dockets TG-080913, TG-080914, TG-081089, and TG-082129, Order 03/01, at 8, ¶ 22.